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No. 79-1178

In the Supreme Court of the United States

OCTOBER TERM, 1979

FAYMOR DEVELOPMENT CO., INC., PETITIONER

v.

EVELYN M. KING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the court of appeals erred in affirming a district court order that permanently enjoins the Secretary of Housing and Urban Development from financing or funding a proposed low-income housing project[1] in which petitioner has an interest as developer.

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[1]Section 8 of the Housing and Community Development Act of 1974, 42 U.S.C. 1437(f), authorizes the Secretary to make assistance payments to owners who construct or rehabilitate housing in which some or all of the units are available for occupancy by lower-income families. Standards promulgated by the Secretary to govern project-site selection provide in relevant part (24 C.F.R. 880.112):

(c) The site shall not be located in:

(1) An area of minority concentration unless * * *

1. On July 6, 1978, the Secretary approved petitioner's proposal for the development of a six-story low-income project on Staten Island, New York (the "Tenhill project"). Respondents, the Staten Island Branch of the National Association for the Advancement of Colored People and residents and organizations in the area of the project, commenced this action against the Secretary and petitioner in the United States District Court for the Eastern District of New York, seeking an injunction against the use of federal funds in construction of the project. Respondents alleged that the project would increase minority concentration and upset the existing racial balance in the project area, in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution, the Fair Housing Act of 1968 (42 U.S.C. 3601 *et seq.*), the Housing and Development Act of 1974 (42 U.S.C. 5301 *et seq.*), the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), and HUD's site-selection regulations (24 C.F.R. 880.112).

After a trial, the district court permanently enjoined the Secretary from funding the Tenhill project (Pet. App. 36a). The court found, *inter alia*, that selection of the project site had occurred (i) without adequate consideration of minority concentration in the project area, (ii)

(ii) the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in the proportion of minority residents in the area * * *.

(2) A racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area.

(d) The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

without reference to 1978 census data that had rendered obsolete earlier data (including 1970 census data on which the Secretary had exclusively relied) in its reflection of the racial and ethnic composition of the project area, and (iii) without reference to census data from a census tract adjacent to the project site (Pet. App. 22a-35a). The court of appeals affirmed (Pet. App. 39a-41a).

2. Petitioner contends (Pet. 5-6) that the district court's judgment is incorrect because the court relied primarily on *Karlen* v. *Harris*, 590 F. 2d 39 (2d Cir. 1978), which this Court subsequently reversed in *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, No. 79-184 (Jan. 7, 1980). The court of appeals in *Karlen* prevented the Secretary from financing a low-income housing project because it found that the decision to ~~found~~ FUND the project violated a substantive requirement of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*, that the "social environmental impact" of low-income housing concentrations be given weight in agency decision-making. 590 F. 2d at 44. In reversing, this Court held that the Secretary had satisfied her "essentially procedural" duties under NEPA when she considered the environmental consequences of the project-site designation. The court of appeals' error in *Karlen* thus was in prescribing the substantive weight that the agency had to give to those consequences. Slip. op. 4-5.

Although the district court's decision in this case relied in part on the Second Circuit's construction of NEPA in *Karlen* (see Pet. App. 33a-34a and n.32), the court's judgment also rested on independent grounds. The district court held that the Secretary had acted arbitrarily and capriciously in relying exclusively on what the court felt

were outdated census data in determining whether HUD's own site-selection standards concerning racial and economic impact had been satisfied (see Pet. App. 16a-28a). Judicial review of final site-selection decisions under the Administrative Procedure Act (5 U.S.C. 706(2)(A)) is, consistent with this Court's decision in *Karlen* (see slip op. 5).[2]

The difficulty here is that the court of appeals' brief affirmance simply "agree[s]" with "the decision" of the district court to enjoin funding of the project, without revealing whether the affirmance is based solely or exclusively on the construction of NEPA rejected in *Karlen* (Pet. App. 40a-41a). Although an affirmance on the ground that the Secretary misapplied her regulations might have been proper, it may be that the court of appeals' actual ground for decision has been virtually, if not completely, eclipsed by this Court's decision in *Karlen*. Accordingly, the Court may wish to grant the petition, vacate the judgment below, and remand the case for reconsideration in light of this Court's decision in *Karlen*.

Finally, we agree with petitioner (Pet. 11) that the district court should not have enjoined the Tenhill project but should have remanded the proposal to the Secretary for further proceedings (Pet. App. 36a).[3] See *South*

[2]Petitioner erroneously asserts (Pet. 9-10) that the decision below requires the Secretary to evaluate proposed housing projects *ad hoc* in lieu of criteria set out in the Department's site-selection standards. To the contrary, the district court's opinion affirms the validity of the standards set forth in the Department's regulations, 24 C.F.R. 880.112 (Pet. App. 19a).

[3]The judgment did not enjoin petitioner from constructing the Tenhill project but enjoined only the use of federal funds for that purpose (Pet. App. 35a n.33).

Prairie Construction Co. v. *Operating Engineers*, 425 U.S. 800, 805-806 (1976); *FPC* v. *Transcontinental Pipeline Corp.*, 423 U.S. 326, 333 (1976). The Secretary did not seek review of the district court judgment, however, and this issue itself is insufficiently substantial in these circumstances to warrant review by this Court. In the event the Court remands this case to the court of appeals, petitioner may seek reconsideration of this ruling as well.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment below vacated, and the case remanded to the court of appeals for reconsideration in light of this Court's decision in *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, No. 79-184 (Jan. 7, 1980).

WADE H. MCCREE, JR.
Solicitor General

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